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In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

I. GOODYEAR FAILED TO ADEQUATELY RAISE AND PRESERVE ITS CONSTITUTIONAL CLAIMS IN THE COURTS BELOW AND PRUDENCE REQUIRES THE DENIAL OF ITS PETITION FOR WRIT OF CERTIORARI.

II. THIS IS NOT THE APPROPRIATE CASE FOR THIS COURT TO CONSIDER WHETHER THE AWARD OF PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE GOODYEAR WAS NOT SUBJECTED TO UNLIMITED MONETARY PUNISHMENT.

III. THIS IS NOT THE APPROPRIATE CASE FOR THIS COURT TO CONSIDER WHETHER THE AWARD OF PUNITIVE DAMAGES VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

JURISDICTION

None of the federal constitutional questions now presented by Goodyear were properly pressed or passed upon below. Goodyear did not comply with state procedures requiring notice to the Attorney General nor with Rule 28.4(c), United States Supreme Court Rules.

STATEMENT OF THE CASE

On December 19, 1981, Dale Hodder, a healthy 17-year-old high school boy, was employed as a part-time attendant at a gas station, Remer Oil Company owned by Dale Zorman, in a small rural town in northern Minnesota. On that day, Hodder sustained catastrophic brain injuries while mounting a 1955 Goodyear KWX multi-piece rim on a logging truck. The rim explosively separated causing depressed skull fractures, brain damage, seizures, left side paralysis, and cognitive deficits, permanently disabling him from employment and requiring attendant care for life. *Hodder v. The Goodyear Tire & Rubber Company*, 426 N.W.2d 826, 829 (Minn. 1988), *reh'g denied* (July 25, 1988). The KWX rim in question was in serviceable condition at the time of the explosion. *Id.*

On July 7, 1982, Hodder filed his original Complaint against The Goodyear Tire & Rubber Company and later amended his Complaint to include its subsidiary, the Motor Wheel Corporation. Both complaints alleged that Goodyear was negligent in design of the KWX rim and failure to warn and instruct in its safe use, including failure to alert the motoring public as to the peculiar dangers involved in the use of the KWX rim after 1955.

(App. B, pp. A21-26; App. D, pp. A35-40). Punitive damages were alleged. As submitted, the product design defect theory required the jury to determine whether Goodyear knew or should have known of a KWX design defect in 1955. The jury found that Goodyear had no notice in 1955 of a design defect, found no negligence on Hodder's part, and apportioned causal negligence of 42.5% each to Goodyear and to Motor Wheel for their negligent failure to warn or instruct Hodder and 15% to Remer Oil, the employer, for its failure to warn or instruct Hodder. (App. Q, pp. A114-116). *Hodder*, 426 N.W.2d at 829.

Goodyear was held liable for punitive damages by clear and convincing evidence pursuant to Minn. Stat. §549.20.[1] At Goodyear's urging, the Minnesota Supreme Court remitted the punitive damages from $12,500,000.00 to $4,000,000.00.

The jury considered, and the Minnesota Supreme Court reviewed the following facts which clearly and convincingly proved Goodyear's willful misconduct, justifying an award of punitive damages. The KWX rim, also known as the KB, a design unique to Goodyear, was produced from 1954 to 1962 when production was discontinued for safety. (App. A, pp. A4-5). In 1971 Goodyear engineering proposed to drop all K-rims for safety. (App. A, p. A6). When asked in 1970 by the defects investigators at DOT why KB (KWX) rims were discontinued, Goodyear represented that "nothing really happened" and that it was a commercial decision. (App. A, pp. A1-3).

In November 1972, Goodyear's president, C. J. Pilliod, commanded an all out effort to eliminate the safety

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1. Laws 1978, c.738 §4, eff. April 5, 1978. Amended by Laws 1986, c.444.

hazards of multi-piece tube type truck rims so as to protect Goodyear's investment in tube type tire facilities. (App. A, pp. A7-8). As a result a field study was done by R. M. Smith and the "conspicuous conclusion" was that the majority of rim failures in the field related to the KB/KW/KWX series. (App. A, p. A9). Smith reported to management in 1973 that the parts are inherently dangerous both on the highway and in the shop, that when in use the dangerous condition is often masked, and that Goodyear's expert knowledge with regard to the serviceability of its rims was not being communicated to the user public. (App. A, pp. A10-13). Smith recommended recall. The reasons listed were to escape criticism from Akron, CTA (cover thy ass), reduce liability, threat of government pressure, avoid bad press, and increase sales. *Id.*

In 1977, Motor Wheel undertook to recall K-rims through a "rim safety exchange program" primarily at customer expense. It was a spectacular failure, with only four rims exchanged nationwide. (App. N, p. A104). At the same time Goodyear/Motor Wheel advertised K-rims for sale in its application catalogs.

In October 1979, the National Highway Traffic Safety Administration wrote to Goodyear requesting the recall of K-type rims citing the significantly higher number of accidents found among K-type rims that pointed toward an inherent safety defect. (App. A, pp. A14-16). Initially Goodyear agreed to recall K-rims from service and drafted a customer letter stating that Goodyear was taking this action "in the interest of motor vehicle safety and in the interest of your personal safety." (App. A, pp. A17-18). But Goodyear wanted a *quid pro quo* replacement of K-rims with the LW rims also under investigation and when the government would not "buy

the deal" Goodyear took no further action and the customer letter was never sent.

None of Goodyear/Motor Wheel's warnings reveal the number of accidents, discontinuance of production for safety or the conclusion to recall. Neither Zorman nor Hodder ever received any warning or instruction of the specific dangers of K-type rims or how to avoid those dangers.

The facts relating to Goodyear's misconduct were adopted by the Minnesota Supreme Court. *Hodder*, 426 N.W.2d at 835, 836.

REASONS FOR DENYING THE WRIT

I.

Goodyear Failed To Adequately Raise And Preserve Its Constitutional Claims In The Courts Below And Prudence Requires The Denial Of Its Petition For Writ Of Certiorari.

Goodyear acknowledges its failure to adequately raise and preserve its constitutional claims at any stage of the proceedings below prior to its Petition for Rehearing in the Minnesota Supreme Court. Goodyear attempts to excuse this failure by arguing that its first opportunity to make such claims came after the decision of the Minnesota Supreme Court on May 6, 1988. Goodyear depends entirely on the assertion that its liability for punitive damages in this case is premised on a newly created legal duty. The record proves conclusively, however, that Goodyear not only was apprised of Hodder's allegations of a continuing duty to warn from the outset and the Minnesota courts' movement in that direction, but proposed a stipulation before trial that it had a continuing

duty and actively defended itself at trial by proving its efforts to warn between 1955 and December 19, 1981. Because a continuing duty to warn theory was not new, novel or unexpected, Goodyear's failure to comply with Minnesota state procedural requirements for the preservation of constitutional challenges is an independent and adequate state ground upon which this Court should deny review.

A. Goodyear Was Properly Held Liable For Punitive Damages On A Theory Of Which It Had Knowledge And Upon Which It Defended The Case Long Before The Decision Of The Minnesota Supreme Court.

Contrary to its argument that the decision of the Minnesota Supreme Court was a complete surprise, Goodyear knew from the outset of this litigation that Hodder alleged liability for both actual and punitive damages based on Goodyear's post-sale failure to warn. Hodder's original Complaint filed July 7, 1982, alleges Goodyear's specific knowledge about the dangers of K-type rims after 1955 and specific acts of failure to warn between the date of sale and the date of injury. (App. B, p. A20). The original Complaint also makes a claim against Goodyear for punitive damages arising in part from Goodyear's post-sale failure to warn. Goodyear's Answer to Hodder's original Complaint raises no constitutional challenge to Hodder's claim for punitive damages. (App. C, p. A30).

On August 10, 1984, Hodder filed his Motion to Amend the Complaint, seeking to add Goodyear's wholly owned rim manufacturing subsidiary, the Motor Wheel Corporation, as a Defendant. The Amended Complaint alleges a post-manufacture warning duty of both defen-

dants. (App. D, p. A34). As Goodyear stated in its Memorandum in Opposition to Plaintiff's Motion to Amend the Complaint, the Motor Wheel Corporation did not design, manufacture, sell or distribute the KWX rim in question or any KWX rims. (App. E, p. A42). Instead, Hodder based his allegations of liability against the Motor Wheel Corporation on the fact that Goodyear delegated its continuing warning and instructional efforts on rims, including KWX rims, to Motor Wheel. Thus, Motor Wheel's liability was premised on its post-sale duty to warn, a duty which the jury found Motor Wheel breached. (App. Q, p. A115). After the trial court allowed Hodder to amend his Complaint, neither the Answer of Goodyear nor Motor Wheel contained any claim that punitive damages are unconstitutional for any reason.[2] (App. G, p. A52; App. H, p. A57). Goodyear raised in pretrial motions *in limine* the question of inadmissibility of its activities concerning recall and warning labels. The trial court held even before trial that the evidence was probative of Goodyear's continuing duty to warn. (App. I, pp. A62-63).

In addition to Hodder's allegations of a post-sale duty to warn, the evolution of Minnesota products liability law

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2. Goodyear, as it did in the Minnesota Supreme Court, takes half of a statement made by Hodder's counsel out of context to represent to this Court that Hodder conceded that he was not raising the continuing duty to warn issue. In its *Petition for Writ of Certiorari*, p.5, n.1, Goodyear claims that, "Respondent, Hodder, specifically stated that 'we are not talking about a continuing duty to warn,' Transcript 13,681, App.F. 42a." What Hodder's counsel actually said was, "So we are not talking about a continuing duty to warn in the question, (to the jury), *whereas I think the instruction is broad enough to include a continuing duty to warn.*" Transcript 13,681, 42a [emphasis supplied]. During the same instruction conference Goodyear counsel admitted that Hodder "has been arguing throughout this case that there is a continuing duty to warn . . .". Transcript 12,873 (App. L, pp. A88, A90).

foretold the Minnesota Supreme Court's finding of such a duty in this case. In Plaintiff's Trial Brief, submitted before trial commenced in March 1986, Hodder specifically contended that Minnesota products liability law gave rise to a continuing duty to warn and instruct. (App. J, pp. A64, A69-71). As early as 1977, the Minnesota Supreme Court in *Frey v. Montgomery Ward & Company, Inc.*, 258 N.W.2d 782, 786 (Minn. 1977), recognized the duty of a manufacturer to provide warnings of dangers which might arise from the use of a product if the manufacturer knows or should realize that the product is likely to be dangerous to an inexperienced user. Certainly when a product such as a truck rim is intended to be used for many years, in this case sold before Hodder was even born, the manufacturer could foresee from the *Frey* decision a duty to warn inexperienced users who may handle the product after the original date of sale. In *Gryc v. Dayton-Hudson Corporation,* 297 N.W.2d 727 (Minn. 1980), *cert. denied,* 449 U.S. 921 (1980), the Minnesota Supreme Court upheld the jury's verdict in the plaintiff's favor based in part on the defendant's failure to warn. In its decision, the court reviewed a memorandum relating to the defendant's motivation for not warning which post-dated the sale of the product in question. *Id.* at 740. In *Hauenstein v. Loctite Corporation,* 347 N.W.2d 272, 275 (Minn. 1984), the Minnesota Supreme Court refused to limit the scope of the duty to warn, holding that, "an interpretation that limits the duty to warn in products defects cases is contrary to our case law." As embodied in the Minnesota Jury Instruction Guide, JIG III, 119, the Minnesota courts' recognition that a manufacturer has a duty to keep apprised of all scientific developments in its field of expertise is also consistent with a post-sale duty to warn. *Willmar Poultry Company v. Carus Chemical*

Company, 378 N.W.2d 830 (Minn. App. 1985), *review denied* (Feb. 1986). Based on the duty of the manufacturer to keep abreast of scientific developments, other courts have held that a manufacturer who may not have actual or constructive knowledge of a danger at the time of distribution but which subsequently acquires such knowledge is obligated to take reasonable steps to notify purchasers and consumers of the newly discovered danger. *See Worsham v. A. H. Robins Company*, 734 F.2d 676, 684 (11th Cir. 1984); *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 922 (8th Cir. 1970); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374, 386, 388 (1984); Schwartz, *The Post-Sale Duty To Warn: Two Unfortunate Forks In The Road To A Reasonable Doctrine*, 58 N.Y.U.L. Rev. 892 (1983). Finally, the Minnesota Court of Appeals in *Balder v. Haley*, 390 N.W.2d 855 (Minn. App. 1986), *rev'd on other grounds*, 399 N.W.2d 77 (Minn. 1987), in a decision rendered contemporaneously with the *Hodder* trial, specifically recognized a continuing duty to warn in Minnesota product cases, thus apprising Goodyear at the trial court level of the direction the appellate courts would take.

Because the Minnesota Supreme Court's adoption of a post-sale duty to warn represented a consistent evolution of Minnesota products liability law, this case is distinguishable from the cases relied upon by Goodyear. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U.S. 673 (1930), this Court noted probable jurisdiction where the federal claims had not been raised in the lower state courts because the state supreme courts unexpectedly overruled long lines of previous cases holding to the contrary. The litigants in *Pruneyard* and *Brinker-*

hoff-Faris had no way of anticipating the state supreme courts' reversals before their cases were decided. In *Saunders v. Shaw*, 244 U.S. 317 (1917), the Louisiana Supreme Court broke new legal ground that was unanticipated by the litigants because there was little if any indication in prior case law that such a decision could be forthcoming. Similarly, in *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613, 621-22 (N.M. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (1984), the court refused to impose punitive damages on a newly recognized cause of action for retaliatory discharge because of the defendant's "reliance on the long-standing terminable-at-will rule . . .". The same distinction applies to *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987). In *Hodder*, there is no reversal of a previous decision. The decision merely adopts the theory upon which the parties tried the case, a theory foretold in previous appellate decisions in the state.

The most telling proof of Goodyear's acknowledgment of a post-sale duty to warn is the fact that it devoted much of its defense to its post-sale efforts to warn. Goodyear's trial strategy was to claim Hodder and his employer, Remer Oil Company, were liable for negligently failing to heed warnings disseminated by Goodyear and Motor Wheel contemporaneous with Hodder's employment in 1981.[3] In pursuit of this strategy, Goodyear knew that the jury's consideration of warning efforts could not be limited to the time period before 1955, especially since Hodder was not born until 1964 and Remer Oil was not even in business. Consequently, Goodyear offered the following pre-trial stipulation:

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3. Goodyear benefitted substantially from this claim through the jury's assessment of 15 percent fault against Remer Oil.

As to the issue of notice, Goodyear has stipulated in other cases and is willing to offer a stipulation in this case which will remove the need for Hodder to prove that Goodyear had notice of potential danger which created a duty to warn. For the purposes of Hodder's "failure to warn" allegations only, Goodyear offers the following stipulation:

> By at least the mid-1970's, Goodyear had sufficient knowledge of the potential for pressurized separation of multi-piece rim assemblies so as to create a duty on Goodyear's part to make reasonable efforts to warn of that potential danger.

Goodyear is willing to concede that its duty to warn arose prior to the accident involved in this [Hodder's] case. (App. F, pp. A50-51).

Consistent with this strategy, Goodyear counsel argued to the trial court that evidence of its post-sale warning efforts was admissible. (App. L, pp. A88-90). Goodyear apprised the jury in opening statement of Goodyear/Motor Wheel's post-1955 warning efforts, focusing on a study performed by Robert M. Smith, a Motor Wheel field engineer, in 1972-73, that resulted in changes in Goodyear's multi-piece rim warning efforts. (App. K, pp. A76-87). Goodyear also emphasized its involvement in pursuing the adoption of a standard by the Occupational Safety & Health Administration (OSHA) from 1976 through 1980 relating to the servicing of multi-piece rims. (App. P, pp. A112-113). Goodyear devoted much of its defense to evidence of safety films, posters, manuals, OSHA lobbying efforts and advertising occurring after 1955. Two of Goodyear's key witnesses, Philip Rosenberger and Donald White, were called specifically to tes-

tify about Goodyear's post-1955 warning efforts. Rosenberger, the man responsible for Motor Wheel's multi-piece rim warning efforts through the 1970's, devoted six days of testimony to proving Motor Wheel's efforts on behalf of Goodyear to warn and instruct about the K-rim between 1964 and 1981. Goodyear's Petition ignores Rosenberger's admission of its continuing duty to warn when he testified,

> We have an obligation to put into our catalogs, we have an obligation to tell people how to use those rims and how to mount and demount those rims, because once we have sold the rim to a distributor or on an International truck or something else and it runs 150,000 miles or five years or ten years, *we have an obligation to continue to tell them how to use it.* (App. N, pp. A92, A104) [emphasis supplied].

Rosenberger's testimony, as well as that of Donald White, is replete with references to a post-sale obligation and efforts to warn. (App. N, pp. A92-106; App. O, pp. A107-111). Undertaking such a continuing duty to warn is, itself, sufficient to justify imposition of liability for breaching the duty. *Hodder*, 426 N.W.2d at 833; *see* Steenson, *Products Liability Law in Minnesota: Design Defect and Failure to Warn Claims*, 14 Wm. Mitchell L. Rev. 443, 478 (1988).

Arguing both in Goodyear's defense of Hodder's allegations and in support of its claims of contributory negligence on the part of Hodder and his employer, Goodyear counsel referred again to these post-1955 warning efforts in closing argument. (App. P, pp. A112-113). So adamant was Goodyear in proving post-1955 warning efforts, it argued on appeal that,

> . . . the trial Court's instruction [on failure to warn] made irrelevant all the evidence it introduced of its

> subsequent warning efforts made through safety films, posters, manuals, and advertising.

Hodder, 426 N.W.2d at 833. The inconsistency in Goodyear's current position was not lost on the Minnesota Supreme Court when, in holding that Goodyear had a continuing duty to warn, the court concluded,

> Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seems to us that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.

Id. at 833.

One reason why this is a special case for imposing a continuing duty to warn is noted by the Minnesota Supreme Court:

> Evidence of 134 post-1955 K-rim explosion accidents was offered by Hodder. This evidence was relevant on notice to Goodyear of the K-rim's dangerous propensities and the warnings needed.

Id. at 834. Goodyear has recently admitted that since Dale Hodder's 1981 injury K-rims have caused 25 additional accidents. (App. T, pp. A127, A152). Realistically, it was

no surprise to Goodyear that a state court confronted with these grim facts would hold the manufacturer to a duty to do something to stop the slaughter.

Goodyear's argument that it raised its constitutional claims at its first opportunity to do so is contrary to the steady evolution of Minnesota law, its voluntary undertaking of such a duty, and the record of its own actions, stipulations and admissions in this case.

B. Goodyear's Constitutional Claims Raised For The First Time On Petition For Rehearing Were Untimely.

This Court has long been reluctant to exercise jurisdiction over federal questions not properly raised and ruled upon in state courts below. Whether the "not pressed or passed upon below" rule is a jurisdictional bar to review or merely a prudential restriction, this Court has identified several important policies militating against review in such cases. As Justice Marshall said six months ago,

> Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more apropriate, resolutions: the Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims;[3] failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion

> on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award.

Bankers Life & Casualty Company v. Crenshaw, 108 S. Ct. 1645, 1651 (1988); *see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983), *reh'g denied*, 463 U.S. 1237 (1983). Recognizing the competence of state courts to adjudicate federal constitutional claims, the Court has held that state courts must have the first opportunity to rule upon federal challenges to state actions. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *see Hill v. California*, 401 U.S. 797, 805 (1971). The proper method of raising a federal question in the state court depends upon each state's practice as long as the litigant has a reasonable opportunity to have the issue heard and resolved. *See Michel v. Louisana*, 350 U.S. 91, 93 (1955), *reh'g denied*, 350 U.S. 955 (1956); *Parker v. Illinois*, 333 U.S. 571, 574-75 (1948), *reh'g denied*, 334 U.S. 813 (1948), *petition denied*, 335 U.S. 856 (1948); *Pennsylvania R. Co. v. Illinois Brick Company*, 297 U.S. 447, 462-63 (1936); *Central Union Telephone Company v. Edwardsville*, 269 U.S. 190, 194-95 (1925). This Court has consistently held that, "the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question . . . [where] . . . the procedural rule is 'strictly or regularly followed'." *Hathorn v. Lovorn*, 457 U.S. 255, 262, 263 (1982), *reh'g denied*, 458 U.S. 1131 (1982) (citations omitted).

Minnesota Rule of Appellate Procedure 140.01 specifically limits the issues that may be presented to the Minnesota Supreme Court in a Petition for Rehearing to any controlling statute, decision or principle of law, or any material fact, or any material question in the case which the Supreme

Court has overlooked, failed to consider, misapplied or misconceived. This rule embodies over a century of Minnesota case law precluding consideration of any issue raised for the first time in a Petition for Rehearing. The rule governing the grant of rehearings was first established by the Minnesota Supreme Court in *Derby v. Gallup*, 5 Minn. 119 (1860), and later codified as Rule 140.01. During the 120 year existence of this rule, the Minnesota Supreme Court has consistently held that arguments raised for the first time in a Petition for Rehearing will not be considered or passed upon. *Lentz v. Pearson*, 246 Minn. 145, 74 N.W.2d 662, 669-70 (1956); *First National Bank of West Minneapolis v. Persall*, 110 Minn. 333, 125 N.W. 675 (1910); *see also State v. Adams*, 251 Minn. 521, 89 N.W.2d 661 (1958), *cert. denied*, 358 U.S. 826 (1958). In *Lentz*, the Minnesota Supreme Court denied a Petition for Rehearing stating: "[T]he point specified and relied upon in the Petition for Reargument appeared for the first time in said Petition. This case was not tried below or argued in this Court on that theory. The matter, therefore, is not properly before us." 74 N.W.2d at 669-70. Only if a question decisive of the case and duly submitted has been overlooked by the Court will there be grounds for a rehearing. *See Wurdemann v. Hjelm*, 260 Minn. 455, 110 N.W.2d 150, 151 (1961).

Goodyear admits that it did not raise its constitutional claims at any time prior to its Petition for Rehearing in the Minnesota Supreme Court, although it had every opportunity to do so. Unlike the Mississippi Court in *Hathorn v. Lovorn*, the Minnesota Supreme Court has regularly followed the rule denying consideration of issues raised for the first time on Petition for Rehearing. The *Hathorn* Court recognized that where such a rule is regularly applied, "[q]uestions first presented to the

highest State court on a Petition for Rehearing come too late for consideration here." 457 U.S. at 265 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945)).

C. Goodyear's Failure To Plead Its Constitutional Claims As Affirmative Defenses Is An Independent And Adequate State Ground For Denial Of Its Petition.

The Minnesota courts have held that the unconstitutionality or illegality of a statute is an affirmative defense which must be raised in a responsive pleading pursuant to Minn. R. Civ. P. 8.03. Failure to plead an affirmative defense constitutes waiver of the defense. *Nodland v. Chirpich*, 307 Minn. 360, 240 N.W.2d 513, 517 (1976); *Rehberger v. Project Plumbing Company, Inc.*, 295 Minn. 577, 205 N.W.2d 126, 127 (1973). The Minnesota rule corresponds to similar federal requirements. *Kewanee Oil & Gas Company v. Mosshamer*, 58 F.2d 711 (10th Cir. 1932); Fed. R. Civ. P. 8(c). Neither Goodyear's original Answer nor its Answer to Hodder's Amended Complaint raise an affirmative defense that Minn. Stat. §549.20 or its application is unconstitutional. (App. C, p. A30; App. G, p. A52).

D. Goodyear's Failure To Give The Requisite Notice To The Minnesota Attorney General At The Trial Level And At The Appellate Level And Its Failure To Comply With The Requirements of Rule 28.4(c), United States Supreme Court Rules, Are Independent And Adequate State Grounds For Denial Of Its Petition.

Goodyear failed to comply with the rules of this Court and the Minnesota courts requiring notification of the

State Attorney General when it is claimed that a state statute is unconstitutional. Goodyear's constitutional claims as to Minn. Stat. §549.20 are vague. The ambiguity may result from Goodyear's realization that it has failed to preserve any attacks on the constitutionality of a state statute pursuant to the rules of this Court and the Minnesota courts. Nevertheless, Goodyear's constitutional claims must, at the very least, be taken as an implicit attack on §549.20 and the standards upon which it allows the award of punitive damages.[4]

Minnesota Rule of Civil Procedure 24.04 provides,

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the Attorney General thereof within such time as to afford him an opportunity to intervene.

Historically, the Minnesota Supreme Court has been very reluctant to consider the constitutionality of any state statute when proper notice has not been given to the Attorney General pursuant to Rule 24.04. *Elwell v. County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538, 545 (1974).[5] In *Elwell*, Hennepin County failed to give the

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4. Goodyear briefly addresses §549.20 in the context of its due process argument in footnote 5 of its *Petition for Writ of Certiorari* at 19.

5. *See Hughes v. Patrick and Associates*, 300 Minn. 387, 220 N.W.2d 347, 348 (1974) ("We dismiss the appeal for what we hold to be a failure to fully comply with the rules requiring notice to the attorney general in actions attacking the constitutionality of a statute . . . ."); *Johnson v. Village of Plymouth*, 288 Minn. 300, 180 N.W.2d 184, 185 (1970) ("We do not reach the constitutional issues which were neither submitted to the trial court nor brought to the attention of the Attorney General

(Continued on following page)

Attorney General notice of its claim that Minnesota's green acre statute was unconstitutional. Although the *Elwell* court ultimately agreed to consider the constitutional question, it did so because the issue had been specifically raised during the district court proceedings, the court noting that "the statute was argued by the parties in briefs submitted after the trial and was discussed at length in the trial Court's Memorandum." *Id.* at 542, 545. Therefore, the question, having been specifically considered by the trial court, was within the scope of the Minnesota Supreme Court's review. *Id.* The *Elwell* court noted, however, that the "clear intent of the rule is to provide notice to the Attorney General of an attack upon the constitutionality of a legislative act so that he may have the opportunity to defend its constitutionality." *Id.* at 544. *See Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988); *In Re: Leary's Appeal*, 272 Minn. 34, 136 N.W.2d 552, 560 (1965). Goodyear did not give notice in 1982 or thereafter of any constitutional claims as required by Rule 24.04 (App. R. pp.

Footnote continued—

under rule 24.04, Rules of Civil Procedure."); *Campbell v. Glenwood Hills Hospitals, Inc.*, 273 Minn. 525, 142 N.W.2d 255, 260-61 (1966) (Minnesota Supreme Court refused to consider the constitutionality of statute because no notice had been given to attorney general pursuant to Minn. R. Civ. P. 24.04.); *In Re: Leary's Appeal*, 272 Minn. 34, 136 N.W.2d 552, 560 (1965) ("It was incumbent upon the appellant in this case if she wished to raise the constitutionality of the statute, to serve the required notice upon the attorney general."); *Lowe v. Patterson*, 265 Minn. 42, 120 N.W.2d 313, 316 (1963) ("The rules themselves require that all assignments challenging the constitutionality of statutes must be called to the attention of the Attorney General. Without such notice they may not be reviewed."); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988) ("Appellant has not raised the issue in a timely manner. In addition, the attorney general should have been notified in writing prior to conclusion of the trial in order to allow the opportunity for the state to defend the statute's constitutionality.").

A120-121) and failed to specifically articulate its current constitutional claims in the trial court.

The Minnesota Rules of Appellate Procedure also require notice to the Attorney General. Rule 144, Minn. R. App. P. In *McGuire v. C&L Restaurant, Inc.*, 346 N.W. 2d 605, 609 n.4 (Minn. 1984); the court held that "notice must be served upon the Attorney General pursuant to Minn. R. Civ. P. 24.04 *and* Minn. R. App. P. 144 when the constitutionality of an act of the legislature is questioned in any action to which the state is not a party." (emphasis supplied). As verified by the Affidavit of Assistant Solicitor General Richard Slowes, the only notice given by Goodyear was at the appellate level. (App. R, pp. A120-122). None of the claims Goodyear now makes are contained in its Notice. Instead, the Notice is limited only to the claims that Minn. Stat. §549.20 allows the award of punitive damages based on acts toward "others," and that the trial court applied the statute by basing punitive damages on "conduct unrelated to the underlying cause of action." *Id.*

One reason for this requirement at the trial court level is to allow the legislature to amend or otherwise correct any perceived constitutional problem with the statute. Minnesota Statute §8.08 provides in relevant part:

> The Attorney General shall report to the governor biennially on or before October 1 of each even numbered year the number, character, and result of all actions and proceedings in which he has appeared for the state, . . . with such recommendations for amendment of the laws as he may deem necessary or proper, . . .

Further, in Minnesota the Attorney General acts as an advisor to the legislature and to legislative committees as provided in Minn. Stat. §8.05 as follows:

> . . . When required by either house of the legislature he [Attorney General] shall give his written opinion upon any question of law. The Attorney General similarly shall give his written opinion upon any question of law submitted to him by a permanent or interim committee or commission of the legislature or of either house of the legislature, including but not limited to an interim committee of the legislature created by law for a county containing a city of the first class.

If Goodyear had given such notice setting forth its present constitutional claims, the legislature would have had four years to amend or correct any perceived shortcomings in the statute before submission of the punitive issue to the *Hodder* jury in July 1986. With the advice of the Attorney General, the Minnesota trial court could resolve the issue "by relying on the state constitution or some other adequate and independent non-federal ground." *Bankers Life*, 108 S. Ct. at 1651. In any event, the Minnesota Supreme Court would have "an opportunity to decide the question of federal law in the first instance" and this Court thereby "gain the benefit of a well-developed record and a reasoned opinion on the merits." *Id.*

Goodyear's Petition accuses the Minnesota courts of "apparent indifference to these important constitutional issues" and state legislatures in general of doing "almost nothing to impose meaningful control."[6] It is Goodyear's

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6. Goodyear's assertion that the Minnesota legislature has ignored constitutional concerns expressed by this Court in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986); and *Bankers Life*, is without merit. Minn. Stat. §549.20, requiring proof of punitive conduct by clear and convincing evidence, was passed in 1978, eight years before *Aetna* and the Minnesota legislature has not been in session since the *Bankers Life* decision in May 1988.

indifference to the state procedural requirements and Goodyear's strategy to do nothing until the case was lost on appeal that deprived Minnesota of resolving any punitive damage concerns in a less intrusive and possibly more appropriate manner.

Goodyear continues in this Court to ignore the right of the State of Minnesota to defend the constitutionality of §549.20. Rule 28.4(c), United States Supreme Court Rules provides:

> In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403 (b) may be applicable and shall be served upon the Attorney General of the State. . . .

Goodyear's Petition for Writ of Certiorari omits any notification that 28 U.S.C. §2403(b) may be applicable to this case, and the service certificate does not list the Minnesota Attorney General as a recipient.

Compounding these procedural failures is the fact that the Minnesota Constitution has provisions under which the Minnesota Supreme Court could have reviewed Goodyear's current constitutional claims had they been properly presented. Minn. Const. art. I, §§ 4, 5, 6. The same procedural failure occurred in *Bankers Life*. 108 S. Ct. at 1650. Goodyear's failure to properly raise those claims deprived the Minnesota Supreme Court of its opportunity to address these issues on independent and adequate state grounds.

Hodder raised these procedural failures in opposition to Goodyear's Petition for Rehearing in the Minnesota

Supreme Court. (App. T, pp. A127-135). This case fits squarely within the rule frequently stated by this Court that, "when 'the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show to the contrary'." *Webb v. Webb*, 451 U.S. 493, 495 (1981) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969) (citations omitted)); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Goodyear has not and cannot make such a showing in this case.

In addition to principles of comity to the states, this Court has identified "a constellation of practical considerations, chief among which is [its] own need for a properly developed record on appeal" in refusing to exercise jurisdiction over federal questions "not pressed or passed upon below." *Bankers Life*, 108 S. Ct. at 1651. "There should be no doubt from the record that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb*, 451 U.S. at 501 (emphasis in original). The record in this case proves only Goodyear's repeated failure to properly raise its constitutional claims in the Minnesota courts. As a result, the record is inadequate to satisfy this Court's long standing tests for review of state court cases involving a federal constitutional challenge to a state statute.

II.

This Is Not The Appropriate Case For This Court To Consider Whether The Award Of Punitive Damages Violates The Due Process Clause Of The Fourteenth Amendment To The United States Constitution Because Goodyear Was Not Subjected To Unlimited Monetary Punishment.

The facts of this case are even less appropriate for review than those in *Bankers Life*. Unlike *Bankers Life*, Goodyear does not claim that the punitive damage award was unjustified in light of its conduct, that the award constituted a "windfall" to Hodder, that the ratio of the award to the compensatory damages, which is nearly 1:1, is inappropriate or disproportionate to its net worth.

In addition to these factual distinctions, Minnesota, unlike Mississippi, provides detailed statutory guidance governing the jury's award of punitive damages. Minnesota Statute §549.20 sets forth standards not only defining punitive conduct, but providing factors for the jury to consider in determining the appropriate amount of punitive damages. Moreover, §549.20 requires proof of punitive conduct by a stricter standard of clear and convincing evidence.[7] Section 549.20(3) provides:

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7. The Minnesota Supreme Court in *Gryc*, 297 N.W.2d 727, 739 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980), observed that the Minnesota legislature changed the legal standard for punitive damages in 1978 from the preponderance of the evidence standard applicable in the *Gryc* trial. The imposition of a stricter standard of proof further indicates the Minnesota legislature's goal of regulating the award of punitive damages. The *Hodder* jury was instructed that clear and convincing evidence "must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others."

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of the hazard to the public arising from the Defendant's misconduct, the profitability of the misconduct to the Defendant, the duration of the misconduct and any concealment of it, the degree of the Defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the Defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the Defendant, and the total effect of other punishment likely to be imposed upon the Defendant as a result of the misconduct, including compensatory and punitive damage awards to the Plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the Defendant may be subject.

Goodyear had notice in 1978 of the factors under which it could be held liable for punitive damages in Minnesota.

The jury considered, and the Minnesota Supreme Court reviewed substantial evidence which, when judged under the factors set forth in §549.20, clearly and convincingly proved Goodyear's willful indifference. Goodyear argues that the §549.20 standards are "virtually meaningless," but it fails to state why or offer any specific due process criticism.

To the extent a due process concern arises over the "open-endedness" of punitive damage awards, §549.20 allows the defendant to mitigate such an award through evidence of other punishment already assessed or likely to be assessed as a result of its misconduct, which Good-

year chose not to do.[8] The Minnesota Supreme Court invoked its stricter standard of review of punitive awards by tempering the jury's discretion through remittitur, a remedy specifically urged by Goodyear. *Hodder*, 426 N.W.2d at 837. In fact, after the remittitur was granted, Goodyear declared itself the successful appellant. (App. S, p. A125).

Ten years before this Court's decision in *Bankers Life*, the Minnesota legislature took steps to insure that punitive damages are awarded only in cases where the evidence clearly and convincingly proves the defendant's willful indifference and that the amount of punitive damages is appropriate in light of the defendant's conduct. These safeguards, combined with the review and remittitur powers of the Minnesota Supreme Court, resulted in a punitive damage award that constitutes .0575 of one percent (or 1/17th of one percent) of Goodyear's $6,-953,500,000.00 assets at the time of trial and that is reasonably proportionate to the jury's compensatory award. (App. M, p. A91). Hodder contends that placing an arbitrary ceiling on the award of punitive damages, thus making them predictable as Goodyear and others seem to request, will all but eliminate the punishment and deterrent effect of punitive damages. Knowing their maximum exposure for product liability misconduct, manufacturers would simply budget that exposure into their cost of doing business. On the other hand, punitive damages which are unpredictable, but within reason, do not allow Defendants to "budget" their misconduct.

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8. Section 549.20 also allows consideration of compensatory damage awards in mitigation of punitive damages and vice versa. Significantly, the vast majority of the jury's compensatory award was comprised of economic losses with a relatively small percentage being allocated to non-economic damages such as pain and suffering. (App. Q, pp. A114, A117-118).

Minnesota has a vital state interest in protecting its citizens from product manufacturers who engage in the type of conduct in which Goodyear engaged in this case. The *Gryc* Court concluded,

> Most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, prudently use their resources to prevent excessively hazardous products from reaching or staying on the market. On occasion, however, manufacturers abuse their control over safety information and market defective products in flagrant disregard of the public safety. . . . A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

297 N.W.2d at 733, 737. For this Court to review punitive damages in the context of this case would be to unnecessarily intrude upon these vital Minnesota interests which have been carefully reviewed and regulated by both the Minnesota legislature and the Minnesota Supreme Court.

Even if this Court after plenary review in another case is inclined to impose a ceiling on punitive damages either in absolute dollars, ratio to compensatory damages, or percentage of financial condition, this case will certainly fall within such limits. In evaluating all of the due process concerns expressed by Justice O'Conner in *Bankers Life*, this case represents the most reasoned approach and result of any of the punitive damages cases either presently before this Court on Petition for Writ of Certiorari or in which certiorari has been denied.

III.

This Is Not The Appropriate Case For This Court To Consider Whether The Award Of Punitive Damages Violates The Excessive Fines Clause Of The Eighth Amendment To The United States Constitution.

A. Goodyear Failed To Preserve Its Excessive Fines Claim In The Courts Below.

Although this Court in *Bankers Life* found the excessive fines question to be of "some moment and difficulty," it did so in declining to review the issue because of petitioner's failure to properly preserve its claim in the courts below. 108 S. Ct. at 1651. The Court concluded that where the question is important, the policies of comity to the states and the Court's need for a properly developed record on appeal, "apply with special force." *Id.* Goodyear cannot rely upon the Minnesota Supreme Court's decision in this case as an excuse for its failure to properly raise its excessive fine claim in the courts below. Regardless of the theory upon which the damages were based, the existence of Minn. Stat. §549.20, Hodder's punitive damage allegations, and the jury's $12,500,000.00 punitive damage award gave Goodyear ample notice and opportunity to raise an excessive fines challenge years before its Petition for Rehearing in the Minnesota Supreme Court.

B. Regardless Of Eighth Amendment Implications In Civil Punitive Damage Awards, The Amount Of Punitive Damages Assessed Against Goodyear In This Case Was Not Excessive.

Regardless of whether the Excessive Fines Clause of the Eighth Amendment applies to punitive damage awards

in civil cases, there is no evidence that the punitive damage award in this case constitutes an excessive fine. *Hodder* evidences the state court's practice of maintaining "close control over the imposition and assessment of punitive damages." 426 N.W.2d at 835.

Goodyear's final argument is that the punitive award far exceeds the maximum punishment established by the Minnesota legislature for similar conduct under Minnesota's Consumer Fraud Act, but the same legislature passed §549.20 establishing the standards for the award of punitive damages in civil cases and allowing the jury to consider other fines or punishment assessed against the defendant. Nothing in the Consumer Fraud Act precludes a civil action for compensatory and punitive damages. Goodyear's reliance on *Solem v. Helm*, 463 U.S. 277 (1983), is misplaced. The *Solem* decision stands for the proposition that punishment must be proportional to the conduct as judged by objective criteria. Those criteria, "including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions", *Id.* at 292, are strikingly similar to the factors set forth in Minn. Stat. §549.20 in determining the amount of punitive damages to award in a particular case.

CONCLUSION

The belated and vague assertions of Fourteenth Amendment due process and Eighth Amendment excessive fines violations are not properly preserved and are not applicable to the facts and law of this case. The Court should deny Goodyear's Petition for Writ of Certiorari to the Supreme Court of Minnesota.

Respectfully submitted,

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